



Open Government Partnership Fourth National Action Plan Commitment 7 – improving scrutiny of OIA exemptions

Discussion paper to support targeted engagement
Written by Democracy + Open Government policy team, Ministry of Justice

Note: This is not government policy nor agency advice. It is a summary of a project and research for that project.

How to have your say

Please email any feedback to anna.moore-jones@justice.govt.nz **by 15 March 2024**

Key questions are outlined on page 10 under 'Next Steps' for your consideration.

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For Consultation

Purpose of Paper

1. This paper is intended to assist discussion about strengthening the scrutiny of legislative clauses that propose to override the disclosure requirements of the Official Information Act 1982 (OIA).
2. It is part of the work to progress Commitment 7 of the Open Government Partnership (OGP) Fourth National Action Plan (NAP4).
3. It is a working document that can be added to as thinking progresses. It is not official government policy.

Background

4. The Open Government Partnership (OGP) is an international agreement by governments to create greater transparency, increase civic participation and use new technologies to make their governments more open, effective, and accountable.
5. National Action Plans (NAP) are created out of ideas put forward by the public and civil society. These ideas are then developed into potential “commitments” by civil society, members of the public and government agencies. The NAP works to a two-year cycle and is regularly assessed on progress with commitments.
6. New Zealand’s Fourth National Action Plan (NAP4) was published in December 2022 after several weeks of consultation on a draft plan.¹

Commitment 7

7. Commitment 7 of NAP4 arose from analysis conducted by the NZ Council for Civil Liberties. The Ministry of Justice (the Ministry) is the lead agency on Commitment 7.
8. Commitment 7 is replicated below:

¹ [Fourth National Action Plan | Open Government Partnership \(ogp.org.nz\)](#)

Commitment 7 – Strengthen scrutiny of Official Information Act exemptions in Legislation

Objective: To strengthen the scrutiny of legislative clauses that propose to override the disclosure requirements of the Official Information Act 1982.

Ambition: To strengthen the guidance and procedures agencies must follow in relation to the scrutiny of new legislative clauses that propose to override the disclosure requirements of the Official Information Act 1982 in relation to certain information.

Status quo: Civil society representatives are concerned that current legislative processes regarding proposed clauses to exempt certain information from the release provisions of the Official Information Act 1982 are not adequate. This may result in OIA exemption clauses being introduced when they are not needed.

There are now more than 85 clauses in legislation that override the presumption of availability of official information found in section 5 of the Official Information Act 1982. More than 20 have been added as a result of legislation introduced since 2019.

Civil society representatives consider such confidentiality provisions may be applied too broadly or only permit disclosure in limited circumstances. This can result in OIA requests being refused under the OIA as being 'contrary to the provisions of a specified enactment'.

There are current safeguards in place, which include the legislative process, guidelines and the Legislative Design and Advisory Committee. It is also the Ministry of Justice's (MoJ) role, for example, to provide advice on Bills that interface with the OIA. This commitment will propose recommendations to strengthen guidance and controls around this process. This may include consultation with the Office of the Ombudsman.

9. When considering the objective outlined within Commitment 7, after publication of the NAP, the Ministry identified three additional or sub-objectives, which are:
- **Supporting policy analysis.** Ensuring public sector agencies are giving due consideration to maintaining the integrity and purpose of the OIA, before they propose alternative disclosure regimes. Understanding how the OIA works with other legislation can also prevent legal ambiguities and other issues in the future.
 - **Increasing transparency.** Ensuring that where an OIA exemption provision is included in a Bill, the justification is explicit and can easily be assessed during the Parliamentary process.
 - **Supporting good regulatory stewardship.** If guidance is created, then it could set the foundation for future work. Guidance could support agencies to review any existing OIA exemptions in their current legislation in light of changing circumstances and operational experience, as part of their ongoing regulatory stewardship programmes. E.g., reassessing need for exemptions if copying provisions from older legislation.

10. The Ministry notes that during the formation of Commitment 7 it was agreed that the following matters were out of scope:
- whether the OIA should override secrecy provisions in other legislation
 - taking a position on whether exemption clauses have been used in excess
 - taking a position on whether exemption clauses should be used less often or more narrowly in the future
 - whether agencies are correctly applying the OIA when an exemption clause is engaged.

What are OIA exemption clauses?

11. OIA exemptions are legislative clauses that propose to override the disclosure requirements of the OIA. OIA exemptions take a number of forms which range from legislation explicitly modifying the effect of the OIA to full confidentiality clauses in legislation.
12. The following provisions aim to ensure that different pieces of legislation do not conflict with one another and allows for official information to be dealt with in different ways, if necessary:
- a. Section 18 (c) (i) of the OIA provides that an OIA may be refused on the grounds that making certain information available would “be contrary to the provisions of a specified enactment”.
 - b. Section 52(3)(a) of the OIA states that nothing within the Act derogates from “any provision which is contained in any other enactment and which authorises or requires official information to be made available”.
13. Through our research, the Ministry has identified the following categories of exemptions (although the list is not exhaustive):
- legislation explicitly modifying the effect of the OIA
 - legislation creating an alternative regime to the OIA
 - confidentiality clause creating an exemption to the OIA
 - confidentiality provision making s18(c)(i) exception available
 - legislation amending the OIA
 - amending the definition of ‘official information’ in other legislation.
14. The Ministry undertook research on pieces of legislation with exemptions to the OIA and considered the public accessibility of the rationale for that exemption. A summary of this research is in the **Appendix**.

Scrutiny Mechanisms

15. There are several opportunities throughout the policy cycle for public sector agencies to consider and discuss the rationale for a proposed exemption to the OIA. These are through various policy tools, used from the first policy analysis stages through to Cabinet decision making and into the legislative process. These tools are being called ‘scrutiny mechanisms’ in this paper as that is their typical function.
16. Each scrutiny mechanism is the responsibility of a different agency across the public sector and each mechanism has its own process for being updated. Some of the different mechanisms available are outlined in the table below, which is intended to summarise the parts of each relevant scrutiny mechanism that references the OIA and provides a potential opportunity for consideration of OIA exemption clauses.
17. As part of Commitment 7, the Ministry is working to discuss, with each relevant agency, future improvements to scrutiny mechanisms.
18. Some of the different mechanisms available are outlined below:

For Consultation

Scrutiny Mechanism	Description of Mechanism	Outline of relevant aspect of mechanism
Cabinet Manual 2023 Edition Paragraph 8.41	An authoritative guide to central government decision making. A primary source of information on New Zealand’s constitutional arrangements. A guide to Cabinet procedures.	“The Ombudsman should be consulted on policy and legislative proposals with implications for access to official information. This can include when a proposal is made to exclude particular information from the Official Information Act 1982. See the Ombudsman’s Guidance on when to engage the Ombudsman in law reform proposals.”
Cabinet Guide Department of Prime Minister and Cabinet (DPMC) Cabinet paper consultation with departments Department of the Prime Minister and Cabinet (DPMC)	Provides practical information and advice for public servants and Ministers’ offices on the procedures and operation of the Cabinet, Cabinet committees, and the Executive Council.	Policy proposals leading to legislation. It is mandatory to consult: <ul style="list-style-type: none"> • the Parliamentary Counsel Office for all proposals for legislation and amendments to legislation and regulations • the Ministry of Justice: <ul style="list-style-type: none"> ○ to ensure consistency with the New Zealand Bill of Rights Act 1990, the Human Rights Act 1993, and the Privacy Act 2020 ○ for proposals for new criminal offences, infringements, or penalties (including civil pecuniary penalties), or to alter existing ones ○ for proposals to create, amend, or remove the jurisdiction of a court or tribunal; that involve access to court information; or which may impact on court-based procedures and workloads
Disclosure statement guidance and template Question 4.9	A departmental document that complements the general policy statement provided by the Minister and intended to better inform parliamentary/public scrutiny.	Question 4.9 of the disclosure statement asks: “Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?”
Legislation Design Advisory Committee (LDAC) guidelines Paragraph 20.5	A guide to making good legislation. Endorsed by Cabinet as the government’s key point of reference for assessing whether draft legislation conforms to accepted legal and constitutional principles. An aid to public officials.	In relation to creating a new public body: “All public bodies should be subject to the Ombudsmen Act 1975, the Public Audit Act 2001, the Public Records Act 2005, and the Official Information Act 1982 (or the Local Government Official Information and Meetings Act 1987). The Acts discussed in this section are key mechanisms by which government bodies are held accountable for their activities. They should apply to all new bodies and existing bodies unless there are compelling reasons for them not to.”

<p>Cabinet Legislation (LEG) paper template</p> <p>Paragraph 15</p>	<p>Agreed process and format for a paper proposing the introduction of a bill or a substantial supplementary order paper.</p>	<p>“If the legislation will amend the existing coverage of the Ombudsmen Act 1975, the Official Information Act 1982, or the Local Government Official Information and Meetings Act 1987, explain why. Consult the Office of the Ombudsman on this issue and summarise its views.”</p>
<p>Ombudsman guidance: when to engage the Ombudsman in law reform proposals</p> <p>Pages 3-4</p> <p>Note – LGOIMA is the local government equivalent to the OIA</p>	<p>Sets out why and when an Ombudsman should be engaged in law reform process and the Ombudsman's view on some key questions that are likely to arise.</p>	<p>“If changes to the OIA/LGOIMA, exemptions from the OIA/LGOIMA, or the establishment of alternative official information regimes are under consideration, the Ombudsman should be consulted. The Ombudsman's view is that the OIA and LGOIMA should apply as broadly as possible as a general regime guiding official information practices across the public sector. The courts have long recognised the OIA as being 'constitutional' in nature. In addition, the OIA is one of the vehicles by which New Zealanders may exercise their fundamental freedom to seek and receive information, as enshrined in section 14 of the New Zealand Bill of Rights Act 1990. It follows that the application of the OIA, as a constitutional measure which reflects fundamental freedoms, should only be curtailed where there is clear justification. The OIA/LGOIMA contain a tried and tested regime which balances the competing interests in accessing information held by public agencies. Creating alternate regimes is generally unnecessary or misguided, and will inevitably involve complex and often unintended interactions with the OIA/LGOIMA.”</p>

Potential options to improve mechanisms for scrutiny

19. The Ministry has outlined nine potential options for improving scrutiny mechanisms. The table includes information on who holds responsibility for each mechanism and an update on work completed by the Ministry.

20. The Ministry would appreciate feedback on these options so several questions have been outlined below for your consideration.

#	Option	Responsible Agency	Timeframe for any update	Comment
1	Additional question in Disclosure Statements template	Treasury	TBC – likely after 2024	At our request, Treasury have put this issue on their register for consideration the next time the template will be updated.
2	LDAC guidance and/or webinar	LDAC w MOJ assistance	TBC – mid 2024	The Ministry presented to all LDAC on 15 February 2024. There may be opportunities to work with LDAC but details are still to be confirmed.
3	MOJ Letter + Guidance Note to Tier 2 Policy Managers and the Government Legal Network	MOJ	Mid-2024	The Ministry should be able to complete within NAP4 timeline.
4	MOJ website update	MOJ	Mid-2024	The Ministry should be able to complete within NAP4 timeline.
5	Update CabGuide	DPMC	Ongoing	The Ministry discussed updates to the CabGuide with the Cabinet Office who indicated they could work to better indicate the relevance of the OIA at the policy writing stage. The Ministry will also consider other updates to the CabGuide.
6	Update LEG template	DPMC		Cabinet Office advised the Ministry that this could require PM approval and may not be

				the best tool for the intended purpose.
7	Policy templates/guidance - require consultation when policy approvals are sought to override the OIA	DPMC		Cabinet Office advised the Ministry that this could require PM approval and may not be the best tool for the intended purpose.
8	Guidance when providing legislative Drafting Instructions - potential to add into instructions for drafters that any instruction to override the OIA must have been discussed with/agreed with MOJ.	PCO	TBC	Meeting TBC – the Ministry is working to set this up.
9	Improvements to legislative scrutiny guidance and advice to Select Committee	Office of the Clerk	TBC	The Ministry spoke to the Office of the Clerk. Any potential changes, if possible, may be on a longer timeframe due to a number of factors.

Next Steps

21. The Ministry would be interested in understanding:

- a. What do you think of the proposed options to improve scrutiny mechanisms? What mechanism do you consider the most useful for making the creation of any OIA exemptions more transparent?
- b. Are there any other options that you consider relevant? What other mechanisms can you think of which should be considered for updating to include reference to the OIA and potential exemptions?
- c. How easy do you find it to access information about exemptions to the OIA? Where do you currently go to look for this information?

22. The Ministry requests that any feedback be received via email **by 15 March 2024**.

APPENDIX: summary of completed research for Commitment 7

Purpose of research

1. The Ministry of Justice carried out research as part of its work leading Commitment 7 (on scrutiny of exemptions to the Official Information Act 1982) within the NAP4.
2. The OIA has a number of withholding grounds. The Ministry wanted to know why lawmakers have considered additional protections are needed to limit when official information can be disclosed. The Ministry also wanted to know how publicly available information is on the rationale for any such exemptions.

Research methodology

3. Eleven pieces of legislation were selected from a list provided by the NZ Council for Civil Liberties in submission during development of the NAP4. It was decided that more recent pieces of legislation would be most useful as, after a certain date, less electronic information is available and easily found, and publicly available information was a key purpose of the research.
4. Research was carried out by scanning through various documents including Cabinet papers, disclosure statements, briefings, departmental reports, select committee reports and so on.
5. A summary of findings from this research is explained below.

Overall themes of research

- ❖ Acts with more fulsome disclosure statements generally had more publicly available information about the rationale for the OIA exemption.
- ❖ Consultation with MoJ, the Ombudsmen and Office of the Privacy Commissioner specifically on the Acts' exemption provisions (rather than on the legislation as a whole) meant that the purpose for the OIA exemption was much clearer by the time the Act was passed.
- ❖ As it stands, some of the Acts looked at in this scan appeared to repeat and clarify OIA withholding grounds.

Detail of themes and findings

6. Legislation administered by the Ministry of Justice, as well as those where the Ministry of Justice was consulted, generally had more information publicly available on the rationale for the OIA exemption. For example, the Criminal Cases Review Commission Act 2019, of which the Ministry of Justice is responsible, made appropriate use of the disclosure statement in providing rationale for the exemption provision.²
7. Several OIA exemptions related to investigative bodies. For example, in the Criminal Cases Review Commission Act, the OIA applies “except in any correspondence or communication that has taken place between the member or employee of the

² [NZ Legislation Disclosures](#)

Commission and any person, in relation to an investigation by the Commission.”³ Civil liberties groups have made a case for exemptions of this kind as providing a lack of transparency.

8. In a number of Acts that were examined, OIA exemption provisions offered assurance to stakeholders that information would be sufficiently protected. This may be due to concerns about the application of the “public-interest override test” or the application of the OIA in situations of high commercial sensitivity and/or privileged information.
9. In some cases where all the information would have been withheld under the OIA, an exemption provision has still been included in the legislation to outline that the relevant information would be withheld in its entirety. For example, this occurs in the Civil Aviation Act 2023⁴ and the Screen Industry Workers Act 2022⁵.
10. The New Zealand Infrastructure Commission/Te Waihanga Act 2019 outlines a statutory power to collect information from agencies about legally privileged contracts held with private companies.⁶ To safeguard the commercially sensitive information and to encourage the sharing of this information for the purposes of the Infrastructure Commission, the exemption provision restates the OIA on points of national security, privacy of persons, legal privilege and judicial independence. (The Organic Products and Production Act 2023⁷ is a similar example.)
11. Finally, in the Acts examined, there were occasions where OIA exemption provisions supported clarification of the application of the OIA to certain bodies or in certain contexts. For example, section 25 of the Venture Capital Fund Act 2019 uses the wording “To avoid doubt...” , when indicating the difference between Guardians (who are not exempt) and the investment vehicle they facilitate (which are exempt).⁸

³ Clause by clause analysis, Committee of Whole House, November 2019 (pages 32-33)

⁴ Section 198, [Civil Aviation Act 2023](#)

⁵ Section 64, [Screen Industry Workers Act 2022](#)

⁶ Sections 24 and 25, [New Zealand Infrastructure Commission/Te Waihanga Act 2019](#)

⁷ Section 60, [Organic Products and Production Act 2023](#)

⁸ [Venture Capital Fund Act 2019](#)